Filed 3/11/09 P. v. Sanchez CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>SANTIAGO NIETO SANCHEZ,<br>Defendant and Appellant. | G039615<br>(Super. Ct. No. 07CF0543)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed in part and reversed in part.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Pamela Ratner Sobeck and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Defendant Santiago Nieto Sanchez was charged with three counts of committing a lewd act on a child under 14 years of age. A jury found defendant guilty of two of the counts. The jury found defendant not guilty as to the third count, but found him guilty of two lesser included offenses (simple assault and simple battery) as to that count.

As conceded by the Attorney General, we must reverse defendant's assault conviction. The jury improperly found defendant guilty of both assault and battery as lesser included offenses of a single charged offense of committing a lewd act on a child under 14 years of age.

We otherwise affirm the judgment. The trial court did not abuse its discretion by allowing the detective to testify regarding his training on the use of ruses and whether ruses produce untruthful confessions. Even if the trial court had erred in admitting such testimony, any such error was harmless.

## FACTS

In February 2007, E., a ten-year-old girl, lived in a house in Santa Ana with her mother, father, two sisters, brother, and aunt. On February 10, defendant knocked on the door of E.'s house and offered to polish shoes. He told E.'s mother that he had not been working and needed to work to earn money for food. E.'s mother permitted him to polish the shoes of one of E.'s sisters.

Defendant told E.'s mother that he was also a "healer." E.'s mother told him that E. had a headache. Defendant said he would help by massaging E.'s stomach. E. objected to the idea, but her mother said it would be "okay" and invited defendant into the house. E. lay down on the couch in the living room, and defendant began massaging her back and then her head.

Defendant told E.'s mother he needed rubbing alcohol; she left the living room to retrieve it. Defendant reached underneath E.'s underwear and touched her buttocks. E.'s mother returned and defendant instructed her to get bread and one egg for him to place on E.'s stomach so that E. would not have a headache. E.'s mother again left the living room.

Defendant asked E. to "turn around"; she complied. Defendant massaged E.'s stomach and then touched her breast area and vaginal area underneath her underwear. Defendant moved his head toward her and told her to "give me a kiss." E. screamed and her mother ran back into the living room. E. told her mother, "that guy is bad" or "this man is evil. Get him out of here." She told her mother that defendant had touched her breast and vaginal areas. E.'s mother told defendant: "[G]et out. Get out." Defendant gathered his things and was in the process of leaving when E.'s brother stopped him. The police arrived 10 minutes later. Police Officer Ebony Caviness of the Santa Ana Police Department arrived at the scene and found E. "standing in the doorway crying." Defendant was arrested. Caviness interviewed E.

Detective Corporal Robert Valdez of the Santa Ana Police Department interviewed defendant at the police department with Caviness. Defendant initially denied touching E.'s private areas as she had described. After Valdez told defendant that shoe polish had been found "in the private parts of the victim," defendant admitted touching E.'s breast, buttocks, and vagina. Valdez did not know whether shoe polish had been found on E.'s body, but testified this constituted a ruse which he defined as "a tactic that we use to elicit the truth when someone is lying. A r[]use is eventually opening up the opportunity for the person who we believe is lying, to eventually say the truth."

During the interview, defendant also acknowledged that touching E. "excited and aroused him," and that what he did was wrong. He further stated he believed E. to be about 13 years old.

## BACKGROUND

Defendant was charged in an amended information with (1) a lewd act in the form of touching the buttocks of a child under 14 years old (a felony) in violation of Penal Code section 288, subdivision (a) (count 1); (2) a lewd act in the form of touching the breast of a child under 14 years old (a felony) in violation of section 288, subdivision (a) (count 2); and (3) a lewd act in the form of touching the vagina of a child under 14 years old (a felony) in violation of section 288, subdivision (a) (count 3). (All further statutory references are to the Penal Code.) The information alleged, under section 1203.066, subdivision (a)(3), defendant was a stranger to the victim "and made friends with E[.] for the purpose of committing" the crimes charged in all three counts. As to count 3, the information further alleged, under section 1203.066, subdivision (a)(8), that defendant "had substantial sexual conduct with E[.], who was under fourteen (14) years of age, namely: MASTURBATION."

The jury found defendant not guilty on count 1 as charged, and not guilty of the lesser included offense of attempting a lewd act on a child under 14 years old, but found him guilty of two other lesser included offenses as to count 1—simple assault and simple battery. The jury also found defendant guilty on counts 2 and 3 as charged in the information, and, as to those two counts, found it true defendant committed those crimes as a stranger within the meaning of section 1203.066, subdivision (a)(3). The jury did not find it true defendant engaged in "substantial sexual conduct" in the commission of count 3 as alleged in the information.

The trial court sentenced defendant to a total of three years in prison by sentencing him on count 2 to the low term of three years and imposing a concurrent low term sentence of three years on count 3. The court suspended sentence on count 1.

Defendant appealed.

## DISCUSSION

### I.

### *The Jury Improperly Found Defendant Guilty of Simple Assault and Simple Battery as Lesser Included Offenses of Count 1.*

The jury was instructed on three lesser included offenses as to the offense of a lewd act on a child under 14 years of age, charged as count 1: (1) attempted lewd act on a child under 14 years of age; (2) simple assault; and (3) simple battery. The jury returned verdict forms stating it found defendant not guilty as charged in count 1 and not guilty of the lesser included offense of attempted lewd act on a child under 14 years of age. The jury, however, found defendant guilty of both assault and battery, the other two lesser included offenses of count 1. Defendant contends the assault conviction must be reversed because it is a lesser included offense of battery. We agree.

"Conviction of a lesser included offense is an implied acquittal of the offense charged when the jury returns a verdict of guilty of only the lesser included offense. [Citation.] When the jury expressly finds defendant guilty of both the greater and lesser offense, however, there is no implied acquittal of the greater offense. If the evidence supports the verdict as to a greater offense, the conviction of that offense is controlling, and the conviction of the lesser offense must be reversed." (*People v. Moran* (1970) 1 Cal.3d 755, 763; *People v. Pearson* (1986) 42 Cal.3d 351, 355 ["this court has long held that multiple convictions may *not* be based on necessarily included offenses"].) "'An assault is a necessary element of battery, and it is impossible to commit battery without assaulting the victim.'" (*People v. Colantuono* (1994) 7 Cal.4th 206, 216-217.)

In the respondent's brief, the Attorney General agrees that defendant's conviction for assault must be reversed because assault is a lesser included offense of battery and that defendant was improperly convicted of both crimes as lesser included offenses of count 1.

We therefore reverse defendant's conviction for simple assault.

II.

*The Trial Court Did Not Abuse Its Discretion by Allowing Valdez to Testify That Ruses Employed in Police Interrogations Do Not Produce False Confessions; Even If Admission of Such Testimony Was Error, the Error Was Harmless.*

Defendant contends the trial court erred by permitting Valdez to testify that police ruses in interrogations do not produce false confessions and to "impermissibl[y] attempt to tell the jury that [defendant] was guilty." We review the trial court's admission of the challenged testimony for an abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717-718; *People v. Medina* (1990) 51 Cal.3d 870, 887.)

In the opening brief, defendant argues: "Valdez showed himself to be perfectly capable of describing his interview with [defendant], leaving the jury free to decide the credibility of [defendant]'s confession. . . . In fact, the jury even saw a videotape of the interview. . . . Thus, his opinion, presented to the jury as fact—that r[]uses unequivocally do not produce false confessions—was not an admissible lay opinion."

The record shows that during her cross-examination of Valdez, defendant's counsel challenged the circumstances of defendant's interview with the police, including the officers' use of a ruse. This cross-examination included the following:

"Q In this type of case that we're here on today were you taught that you should confront a suspect with evidence that isn't true?

"A Yes.

"Q And were you taught to lie to them?

"A Yes.

"Q Were you taught to keep questioning them even after repeated denials until either they ask for the interrogation to stop or they give you the answer you want; are you trained to do that?

"A It's not the answer that I want, no. That's not correct."

On redirect, the prosecutor asked Valdez questions about his training on interrogation and the use of ruses, as follows:

"Q Based on your background, training and experience when a defendant did not commit the crime in question, does he falsely confess when a r[]use like the type you used is done?

"[Defendant's counsel]: Objection, speculation. No foundation.

"The Court: Lack of foundation. Without prejudice.

"By [the prosecutor]:

"Q Have you used a r[]use before, sir?

"A Yes.

"Q Can you give us a ballpark estimate as to how many times you've used a r[]use when interviewing a suspect?

"A Couple hundred times.

"Q Have you also received training regarding the use of r[]use in an investigation?

"A Yes, sir.

"Q And as part of the training is it as, is a r[]use used in order to obtain a false confession?

"A No, sir.

"Q Are r[]uses the type of thing that normally would lead to a false confession, based upon your training?

"[Defendant's counsel]: Objection. No foundation. Speculation.

"The Court: Sustained. Without prejudice.

"By [the prosecutor]:

"Q Have you learned during the course of your training that r[]uses lead to false confessions?

"[Defendant's counsel]: Objection. No foundation.

"The Court: You've gotten into his training. Overruled. [¶] You may answer.

"[Valdez]: One more time, sir.

"By [the prosecutor]:

"Q Sure. Have you learned as a result of your training whether r[]uses lead to false confessions?

"A They do not.

"Q Based upon the couple of hundred investigations that you have used r[]uses, has it been your experience that r[]uses lead to false confessions?

"A It has never led to a false confession that I have done.

"Q Based upon to the best of your knowledge; is that correct?

"A Yes, sir."

The record shows the trial court did not permit the prosecutor to elicit general opinion testimony that ruses never lead to false confessions. Instead, Valdez's testimony was qualified, stating: (1) he learned in training that ruses do not lead to false confessions; and (2) to the best of his knowledge, his use of ruses in a couple of hundred investigations did not lead to false confessions. Such testimony was offered in response to defendant's counsel's suggestions that the use of the ruses was designed to trick suspects into making false confessions.

Even if the admission of Valdez's testimony on that point was improper, any error was harmless. First, the record shows the trial court repeatedly admonished the jury that defendant's credibility was for the jury to determine. On redirect examination of Valdez, the prosecutor asked, "[w]as it your impression during the course of your initial interviewing of the defendant that he was telling you the truth when he was denying touching her in her private parts of her body?" The trial court sustained defendant's counsel's objection based on speculation, stating, "[i]t's for the jury to determine, not the officer."

During the recross-examination of Valdez, the trial court again admonished the jury that defendant's credibility was for it to decide and Valdez's testimony on that issue was admitted for a limited purpose. Defendant's counsel questioned Valdez on whether he had formed the belief that defendant was lying when he initially denied touching E. Defendant's counsel asked Valdez, "so at that point did you not have an open mind, you wanted to just keep questioning Mr. Sanchez?" Valdez responded, "[i]t was not an issue of having an open mind. I based it on my training, education and experience that he was not being truthful." The court interjected, "[a]gain, I want to caution the jury, it's your decision whether he is being truthful. He is just giving you his impression. That is to be disregarded by you."

Later, the court, the prosecutor, and defendant's counsel agreed on a fuller admonishment to the jury explaining the limited purpose for which they might consider Valdez's testimony on the issue of defendant's credibility. The trial court thereafter admonished the jury, stating: "We've had a discussion about the officer's opinion that the defendant was lying. I tried to explain that, and counsel and I think I should be a little more specific. [¶] An officer's opinion that the defendant was lying is admitted for a limited purpose. Imagine in a box kind of thing. It's admitted to explain why the officer did what he did. It's not admissible on guilt or innocence of the defendant. The credibility of the defendant or any witness is for you to determine. We don't allow officers to come in and just offer opinions on the credibility of people."

Finally, the jury was instructed with the following modified version of CALCRIM No. 333: "Witnesses, who were not testifying as . . . experts, gave their opinions during the trial. You may but are not required to accept those opinions as true or correct. You may give the opinions whatever weight you think appropriate. Consider the extent of the witness's opportunity to perceive the matters on which his or her opinion is based, the reasons the witness gave for any opinion, and the facts or information on which the witness relied in forming that opinion. You must decide whether information

on which the witness relied was true and accurate. You may disregard all or any part of an opinion that you find unbelievable, unreasonable, or unsupported by the evidence."

The jury was also presented with overwhelming evidence of defendant's guilt, independent of any of Valdez's testimony that touched on defendant's credibility. The jury was provided with E.'s testimony, the testimony of E.'s mother which corroborated much of what E. had stated, the testimony of Caviness's interview of E. on February 10, 2007 during which E. described what defendant had done to her, and the videotape (and written transcript of the videotape) of Valdez and Caviness's interview of defendant. In light of this evidence, coupled with the trial court's multiple admonishments to the jury to give Valdez's testimony limited weight and to make its own determination regarding defendant's credibility, we cannot conclude it is reasonably probable a result more favorable to defendant would have been reached had Valdez's testimony regarding ruses and whether they produce untruthful confessions had been excluded. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.)

DISPOSITION

We reverse defendant's conviction for simple assault. The judgment is otherwise affirmed.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.